ORIGINAL

No. 92-6921

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY, AND ROY LAWRENCE BOURGEOIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district judge abused his discretion by refusing to recuse himself under 28 U.S.C. 455(a), which requires recusal when a judge's impartiality might reasonably be questioned.

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OPINION BELOW

The opinion of the court of appeals (Pet. App A2-A3) is reported at 973 F.2d 910.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1992. The petition for a writ of certiorari was filed on December 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of willfully injuring property of the United States, in violation of

18 U.S.C. 1361. Petitioner Bourgeois was sentenced to 16 months' imprisonment, to be followed by a two-year period of supervised release. Petitioners Charles and John Liteky were sentenced to six months' imprisonment. In addition, each petitioner was ordered to make restitution to the United States in the amount of $636.47. The court of appeals affirmed. Pet. App. A2-A3.

1. The evidence at trial showed that, on November 16, 1990, petitioners spilled human blood on the interior and exterior walls of a building located on the Fort Benning Military Reservation. Petitioners left leaflets bearing their signatures at the site. At trial, petitioners did not deny their commission of the offense. Pet. App. A2; Gov't C.A. Br. 5-6.

2. Prior to trial, petitioners moved to recuse the district judge pursuant to 28 U.S.C. 455(a), which requires the disqualification of a judge "in any proceeding in which his impartiality might reasonably be questioned." The motion was premised in large part on the fact that, in 1983, the same district judge had presided over a bench trial that resulted in the conviction of petitioner Bourgeois for offenses arising out of an earlier protest at Fort Benning. Pet. C.A. Br. 4. According to petitioners, the transcript of the 1983 case showed that the judge "sternly lectured and criticized [Bourgeois], interrupted defense cross-examination, refused to hear Father Bourgeois' background, and interrupted and argued with Father Bougeois without prosecution objection." Id. at 5 (citations omitted).

The district court denied the motion, holding that a

defendant may not obtain a judge's recusal based on allegations of bias arising out of the course of judicial proceedings. Pet. App. A19. Petitioners orally renewed the motion to recuse during the course of the trial, and the district court again denied the motion. Pet. 2; Gov't C.A. Br. 6.

3. On appeal, petitioners renewed their recusal claim. Like the district court, the court of appeals held that "matters arising out of the course of judicial proceedings are not a proper basis for recusal." Pet. App. A2. Accordingly, the court of appeals concluded that the district court properly denied petitioners' motion to recuse. Id. at A3.

ARGUMENT

Petitioners contend that the district judge should have recused himself under 28 U.S.C. 455(a) because of allegedly "intemperate remarks" (Pet. 2) he made at the earlier trial of petitioner Bourgeois. They rely principally on United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990), which held that a judge's acquisition of information in a prior case can be grounds for recusal under Section 455(a) if the judge's statements or actions would lead a reasonable person to question his impartiality. 902 F.2d at 1022-1024. Although Chantal differs in approach from the opinion in this case,[1] we doubt that the First Circuit would

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[1] Like the Eleventh Circuit in this case, most courts of appeals that have addressed the issue have held that a motion for recusal under Section 455(a) must be based on circumstances that are extrajudicial in origin. See, e.g., United States v. Barry, 961 F.2d 260, 263 (D.C. Cir. 1992); United States v. Sammons, 918 F.2d 592, 599 (6th Cir. 1990); McWhorter v. City of Birmingham, 906 F.2d 674, 678 (11th Cir. 1990); United States v. Mitchell,

have reached a different result on the facts of this case than did the courts below.[2]

In Chantal, the district judge had stated during the sentencing phase of a previous prosecution that he believed that Chantal was "an 'unreconstructed drug trafficker,'" and that the judge had "no confidence whatever that [Chantal] will change his ways in the future." 902 F.2d at 1020. When Chantal was again

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886 F.2d 667, 671 (4th Cir. 1989); United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987); United States v. Sibla, 624 F.2d 864, 869 (9th Cir. 1980). Although some courts have recognized an exception to that general rule when the moving party demonstrates pervasive bias and prejudice (see, e.g., McWhorter v. City of Birmingham, 906 F.2d at 678), petitioners do not allege, and there is no basis for finding, such circumstances in this case.

[2] The other court of appeals decisions on which petitioners rely (Pet. 3-11) are inapposite. Haines v. Liggett Group Inc., 975 F.2d 81 (3d Cir. 1992), and Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979), each involved an appellate court's exercise of its supervisory power to reassign a case on remand because of the district judge's conduct during his participation in that case, rather than a recusal motion under Section 455(a) seeking disqualification of a judge because of his conduct in previous litigation. Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980), does not address the question whether recusal is required where the appearance of bias arises from information obtained in the course of judicial proceedings; the appearance of bias that led to recusal in that employment discrimination case was the district judge's comment that "'I know [the responsible official of the defendant employer], and he is an honorable man and I know he would never intentionally discriminate against anybody.'" 625 F.2d at 127. Moreover, the Sixth Circuit has made clear since its decisions in Roberts and Nicodemus that a motion for recusal under Section 455(a) must be based on extrajudicial circumstances. See Sammons, 918 F.2d at 599. Finally, in United States v. Coven, 662 F.2d 162 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982), the court declined to grant a recusal motion under Section 455(a) based on the judge's knowledge of allegedly prejudicial information acquired in a prior proceeding, and stated that the fact that the judge came upon the information in her judicial rather than her personal capacity, "even if not dispositive, is relevant to an analysis of the appearance of impartiality." 662 F.2d at 168.

indicted and the case was assigned to the same district judge, Chantal moved to recuse him under Section 455(a), citing the judge's remarks in the previous case. The district judge denied the motion, reasoning that his prior comments arose from a judicial rather than extrajudicial source. Concluding that an appearance of bias could in some circumstances arise out of judicial proceedings, the First Circuit reversed and remanded for consideration of whether the trial judge's impartiality could reasonably have been questioned. 902 F.2d at 1024.

In this case, by contrast, petitioners do not raise a substantial claim that the district judge's impartiality could reasonably be questioned based on his conduct in the prior proceeding. Indeed, in this Court petitioners do not even specify the remarks of the district judge that they believe created an appearance of bias. Although petitioners were more specific in the court of appeals (see Pet. C.A. Br. 17-19), none of the judge's remarks cited by petitioners below was inappropriate or even faintly suggestive of bias on the part of the judge.

The alleged evidence of bias relied on by petitioners in the court of appeals consisted primarily of statements by the district judge relating to the attempt by Bourgeois and his co-defendants at the 1983 proceeding to turn their bench trial into a forum for the expression of their political views. Thus, petitioners found fault with the judge's indication at the outset of the 1983 trial that "[t]his is a judicial forum. This is not a political forum. We are here for the purpose of trying this

criminal case. I just want to be sure that we all understand that." 9/14/83 Tr. 10; see Pet. C.A. Br. 17.

Similarly, petitioners criticize other attempts by the district judge to clarify testimony, assist the orderly progress of the trial, and restrain Bourgeois from testifying about irrelevant matters such as his opinion of the situation in El Salvador. Id. at 17-18; see, e.g., 9/14/83 Tr. 15, 100, 109-110, 146-147, 152-153, 159. In fact, however, those comments by the district judge reflected an appropriate and restrained reaction to Bourgeois's attempts to turn the trial into a political debate, and they provide no basis for questioning the judge's impartiality. Accordingly, even under the reasoning of Chantel, the courts below acted properly in rejecting petitioners' recusal claim.

This Court recently denied a petition for a writ of certiorari that raised precisely the same question that is at issue in this case. See Waller v. United States, No. 91-1410, cert. denied, 112 S. Ct. 2321 (1992). Petitioners point to nothing that would justify a different outcome in this case. Because petitioners' motion to recuse was properly denied under any construction of Section 455(a), further review is not warranted.[3]

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[3] Petitioners John and Charles Liteky were not defendants in the earlier 1983 trial. They do not explain how the district judge's alleged bias against petitioner Bourgeois as a result of that 1983 trial provided any basis for seeking to recuse the judge from trying the case against them. Thus, as to those petitioners in particular, there is no possibility that the district court erred in denying the recusal motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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